

GRIEVANCE AWARD

HEADNOTE 88B720

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ROBSON, M v. Fanshawe College
Award dated May 25, 1989 (Devlin)

Time limits - arbitrability - the grievor alleges College improperly combined sessional and partial load appointments to circumvent the completion of the grievor's probationary period.

Employer raised two preliminary objections: 1) grievor was not continuously employed by the College for four months immediately preceding the filing of her grievance and therefore, pursuant to Article 11.01, was not entitled to the benefits of the grievance procedure set out in Article 11.02 to 11.05; and 2) the grievance was beyond the twenty-day period for making a complaint.

Grievance dismissed: in respect of the employer's first objection, Board held that the employer could not take the position that the grievor was not entitled to grieve in view of its previous position in respect of the Union grievance in an identical matter. In respect of the second objection, Board determined that the time began to run on the last date on which the grievor could have completed her probationary period. Since the grievance was filed more than twenty days after that date, the Board determined that it was untimely.

Peter J. Lukasiewicz

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IN THE MATTER OF AN ARBITRATION

B E T W E E N:

FANSHAW COLLEGE
(the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(the "Union")

RE RELEASE IN RESPECT OF MARCIA ROBSON

BOARD OF ARBITRATION:

Pamela C. Picher - Chairperson
Rene St. Onge - Employer Nominee
John McManus - Union Nominee

**APPEARING FOR THE
COLLEGE:**

Pamela Chapman - Counsel

**APPEARING FOR THE
UNION:**

Brenda Bowlby - Counsel

Hearings in this matter were held in London on May 19 and June 27, 1988.

A W A R D

The Union maintains that the College failed to give the grievor, Ms. Marcia Robson, notice of release from employment that was in compliance with the terms of the collective agreement. It is the position of the Union that the grievor, a full-time probationary employee at the time of her release, was entitled to at least ninety days written notice of release pursuant to the combined operation of article 1(c) of Appendix III (Sessional Employees) to the collective agreement and article 8.01(c) of the agreement. Those and other relevant provisions are set out below:

APPENDIX III SESSIONAL EMPLOYEES

1(a) A sessional employee is defined as a full-time employee appointed on a sessional basis for up to twelve (12) full months of continuous or non-continuous accumulated employment in a twenty-four (24) calendar month period. Such sessional employee may be released upon two (2) weeks' written notice and shall resign by giving two (2) weeks' written notice.

...

(c) If a sessional employee is continued in employment for more than the period set out in paragraph (a) above, such an employee shall be considered as having completed the first year of the two (2) year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be twelve (12) full months of continuous or non-continuous accumulated employment during the immediately following twenty-four (24) calendar month period.

Article 1 RECOGNITION

1.01 The Union is recognized as the exclusive collective bargaining agency for **all academic employees** of the Colleges engaged as teachers (including teachers of Physical Education), counsellors and librarians, all as more particularly set out in Appendix 1 hereto **save and except** Chairmen, Department Heads and Directors, persons above the rank of Chairman, Department

Head or Director, persons covered by the Memorandum of Agreement with the Ontario Public Service Employees Union in the support staff bargaining unit, and other persons excluded by the legislation and **teachers, counsellors and librarians employed on a part-time or sessional basis.**

NOTE A: "Part-time in this context shall include persons who teach six hours per week or less."

NOTE B: "**Sessional in this context shall mean an appointment of not more than twelve months duration in any twenty-four month period.**"

Article 8 SENIORITY

8.01 (a)(i) A full-time employee will be on probation until the completion of the probationary period which shall be two (2) years' continuous employment.

(ii) A full-time employee hired after September 1, 1981, who has completed a probationary period at another Ontario College of Applied Arts and Technology or who holds a valid Ontario Teacher's Certificate and who has one year or more of teaching experience in Ontario will be on probation until the completion of the probationary period which shall be one year's continuous employment.

(b) Effective September 1, 1976, the probationary period shall also consist of twenty-four (24) full months of non-continuous employment (in periods of at least one (1) full month each) in a forty-eight (48) calendar month period. For this purpose, only the period after September 1, 1975, shall be considered and no prior employment or calendar period shall be taken into account or credited. However, an employee's continuous service acquired in accordance with the provisions of the previous agreement dated the 17th day of September 1975, as at August 31, 1976, for the period back to September 1, 1975, shall count as continuous employment or months of non-continuous accumulated employment for the purpose of this Section.

For the purpose of this paragraph, effective September 1, 1976, a calendar month in which the employee completes fifteen (15) or more days worked shall be considered a "full month".

...

(c) During the probationary period an employee will be informed in writing of the employee's progress at intervals of four (4) months continuous employment or four (4) full months of accumulated non-continuous employment and a copy given to the employee. **Also, it is understood that an employee may be released during the first five (5) months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment upon at least thirty (30) calendar days' written notice and during the remainder of the employee's probationary period upon at least ninety (90) calendar days' written notice.** If requested by the employee, the reason for such release will be given in writing.

(d) Upon the completion of the employee's probationary period, a full-time employee shall be credited with two (2) years' seniority if treated under 8.01(a)(i) or one (1) year's seniority if treated under 8.01(a)(ii). An employee who commenced full-time employment with the College directly from the College's predecessor educational institutions shall be credited for the purpose of this Article with seniority equal to the employee's continuous service in such predecessor institution. The list of predecessor educational institutions referred to herein is attached as Appendix VIII of the Collective Agreement.

[emphasis added]

The grievor has been employed by the College through a series of partial load or full-time sessional appointments since 1979. By March of 1979 she had completed "twelve (12) full months of continuous or non-continuous accumulated employment in a twenty-four (24) calendar month period" within the meaning of article 1(a) of Appendix III, set out above. Ms. Robson was then continued in employment for a further period, the period in dispute which gives rise to this arbitration.

By a letter dated April 9, 1986, Ms. Robson was offered "temporary" employment as a full-time probationary teacher for a definite term extending from April 14, 1986 to May 16, 1986. The letter further stipulated that her employment with the College would cease on May 16, 1986. Ms. Robson was thus provided with approximately 37 days

notice of release through the same letter that offered her a term contract of employment of approximately 32 days. The letter dated April 9, 1986 reads as follows:

Dear Ms. Robson:

As a followup to your recent conversation with Mr. M. Black, we are pleased to be able to confirm an offer of temporary employment as a 'Full-Time Probationary' teacher in the Preparatory Studies Division of the College, for the period 1986 04 14 to 1986 05 16 inclusive. The teaching assignment has been established with you and will only be altered if necessary, after discussion with you.

Unless you are advised otherwise in writing, your employment with the College will cease on 1986 05 16 without further written notice.

The terms and conditions of this employment are in accordance with the Collective Agreement for Academic Employees. Please contact Human Resources should you require a copy of that document. Your pay will be based on a rate of \$28,377.00 per annum, and you will be paid on or about the 24th of each month, into a bank account designated by you. The above-quoted rate includes vacation pay. Deductions such as Income Tax, Canada Pension, Unemployment Insurance and OHIP will be made as applicable.

Please sign and return a copy of this letter to our Human Resources Department (Room B1056) to indicate your understanding of and acceptance of this offer of temporary employment. Would you also please phone Human Resources (452-4246) to arrange for an interview for the purpose of completing any necessary documentation. Note that your pay will be initiated only upon completion of both of the above actions.

Any queries regarding your teaching assignment should be directed to your department head.

Yours sincerely,

"Harry Rawson"
President

It is undisputed that for the period of employment under review Ms. Robson was no longer a sessional employee, excluded from the bargaining unit. Instead she had attained the status of a full-time probationary teacher within the bargaining unit. She no longer was paid an hourly wage but was paid on the basis of an annual salary with benefits and deductions. Ms. Robson testified that when she read the terms of the April 9th letter offering her a limited term appointment of approximately 32 days she was concerned that she was not being provided with proper notification of her release from that appointment and thus consulted the Union. As requested, Ms. Robson signed the contract and letter from President Rawson but submitted at the same time the following letter of explanation and position:

1986 04 10

Dear Mr. Rawson:

Please find enclosed a copy of my 'Full-Time Probationary' contract for the period 1986 04 14 to 1986 05 16 inclusive.

Assuming that this contract is in accordance with the Collective Agreement, I accept the conditions of this agreement.

Sincerely,

"Marcia Robson"

On or about May 29, 1986, Ms. Robson filed a grievance alleging that she had received inappropriate notice of release.

On June 12, 1986, Ms. Robson sent the College a memo indicating that she would be unavailable for employment from June 30, 1986 to August 15, 1987 and further stating

that upon her return she wanted to resume her relationship with the College. Ms. Robson utilized the period for personal professional development. It is common ground that when she became unavailable she was not currently employed by the College and thus was not given "permission" to leave. She did not take a "leave of absence" as that term is commonly understood in the employment context. When Ms. Robson developed the intention to become unavailable to work for the College from June 30, 1986 to August 15, 1987 and whether she communicated that intention to the College prior to her memorandum dated June 12, 1986 was not revealed in evidence.

The Union argues that article 8.01(c) entitled the grievor to at least 90 days written notice of release. The Union submits that at the point of her April-May 1986 appointment the grievor was in the second year of her two year probationary period, and thus was well beyond the first five months of her probationary period during which only 30 days notice of release would be required. To place the grievor in the second year of the two year probationary period where she would be entitled to 90 days notice of release, the Union relies on article 1(c) of the collective agreement which provides that a sessional employee who has completed 12 months of continuous or non-continuous accumulated employment in a 24 calendar month period "shall be considered as having completed the first year of the two (2) year probationary period and thereafter covered by the other provisions of the Agreement".

It is the position of the Union that proper notice of release is a mandatory condition precedent to the effectiveness of the release and that in the absence of due notice the release is void *ab initio*. In support of this position, counsel relies on the decision in **Re CIP Containers Ltd. and International Chemical Workers, Local 229** (1973),

2 L.A.C. (2d) 308 (H.D. Brown). Accordingly, counsel maintains that the grievor is still employed and that effective release would now require 90 days notice.

The College has a different view of the grievor's rights. First, counsel for the College argues that the grievor was not "released" within the meaning of article 8.01(c) of the agreement because her definite term of employment from April 14, 1986 to May 16, 1986 just came to its natural end. Counsel maintains that a teacher is "released" for the purposes of article 8.01(c) if the College seeks to terminate the teacher during an indefinite appointment or if it seeks to end ahead of its scheduled end a definite term appointment such as the grievor's. The College maintains that since it did not try to prematurely end the grievor's 30 day definite term appointment, the notice provisions in article 8.01(c) were not triggered.

The second and alternative position of the College is that if the notice provisions apply to a termination at the expiration of a definite term appointment then the grievor would only be entitled to 30 days notice because she was within the first 5 months of her period of employment with the College as an employee within the bargaining unit. Counsel argues that the five months referred to in article 8.01(c) must speak to the period of the grievor's employment as a full-time probationary employee within the bargaining unit and cannot reach back to a point when she was a sessional employee and not included in the bargaining unit.

As a further alternative position, counsel for the College maintains that even if the notice provisions apply to the natural expiration of a definite term appointment and even if the grievor was entitled to 90 days notice of release, the failure to give due notice does not void the release. In support of this position the College relies on the

decision in **Board of Governors of Sheridan College of Applied Arts and Technology and O.P.S.E.U. (grievance of Ronald Brackenridge)** unreported decision of J. Brunner dated May 6, 1985. Counsel maintains that at most the College would be obligated to compensate the grievor for the shortfall in the notice that was actually given. Moreover, counsel maintains that the grievor should not be compensated for any portion of the 90 days that would extend beyond June 30, 1986 since she, by her own volition, became unavailable for work at that point.

After carefully considering the submissions of the parties the Board concludes that the plain meaning of articles 1(a) of Appendix III and article 8.01(c) is that once a sessional employee has completed 12 full months of accumulated employment in a 24 month period (as had the grievor by March of 1986), that employee, at the commencement of a period of subsequent employment, (at least within the immediately following 24-month period), becomes a full-time probationary employee within the bargaining unit having completed the first year of the two-year probationary period. Crediting an employee within the bargaining unit with probationary service through work performed outside the bargaining unit is not an alien concept in collective agreements and, we conclude, is expressly provided for in Appendix III of this collective agreement.

The clear wording of article 8.01(c) indicates that the 30-day notice period which operates during "the first five (5) months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment" refers to the first 5 months of the probation period and is not restricted to the first five months of employment in the bargaining unit. This interpretation flows directly from a full reading of the clause which expressly provides for a 90-day notice period "during the **remainder** of the employee's probationary period ...". The use

of the word, "remainder" in this part of the clause makes it clear that the prior reference to the "first five (5) months" means the first five months of the probationary period.

The Board concludes then that when the grievor performed her work from April 14 to May 16, 1986 she did so as a full-time probationary employee who through the operation of article 1(a) of Appendix III had been credited with one year of probationary service and thus was standing at the commencement of her second year of probation. She thus had completed well more than 5 months of accumulated employment and was entitled to at least 90 days written notice of release. We observe that this conclusion does not prevent the College from giving a teacher in the grievor's position a term of employment of less than 90 days. Rather it requires the notice of release to be 90 days.

The Board does not accept the assertion of the Union that the College's release was void *ab initio* by virtue of its failure to give due notice. The release was effective but it was done in violation of the collective agreement. Accordingly, the grievor should be compensated for the breach by being placed in the position she would have been in had there been no violation of the collective agreement.

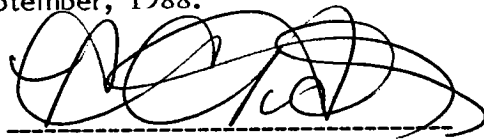
It was on April 9, 1986 that the College gave its notice of the release to be effective on May 16, 1986. It thus provided approximately 37 days notice of release and the grievor was entitled to another 53 days notice. The evidence before the Board does not establish that the grievor would not have been available to work throughout that 90 day period. Her notice to the College of her unavailability from June 30, 1986 to August 15, 1987 was dated June 12, 1986 and thus followed her actual release. Once the failure to give adequate notice has been established, the burden rests with the

College to establish a proper basis for circumscribing the grievor's entitlement to compensation for the shortfall in the notice. That burden has not been met in this instance. It may well be that if the grievor had been asked to work through the 90 day period instead of being released prematurely she would not have become unavailable for work on June 30th. The date of her stated unavailability was formally communicated by a letter dated June 12th, a date after her release. The College has not established that the grievor would not have been available to work through the 90 day period if she had been asked in a timely manner.

Accordingly, the Board concludes that the appropriate remedy for the College's breach of the collective agreement is to compensate the grievor for 53 days wages in lieu of the notice she should have received.

For the reasons set out above the Board finds that the College breached the collective agreement through its failure to provide the grievor with 90 days notice of release. The College is directed to fully compensate the grievor for her losses on the basis of 53 days wages in lieu of notice. The Board remains seized in the event that a dispute arises over the implementation of this Award.

DATED at Toronto this 9th day of September, 1988.



Pamela C. Picher
Chair

I CONCUR.

"Rene St. Onge"

Employer Nominee

I CONCUR.

"John McManus"

Union Nominee